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No. 06-_____

In The

# Supreme Court of the United States

MICHAEL FALCONE AND
JAMES JANNETTI,

*Petitioners,*

v.

STATE OF MAINE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Maine Supreme Court erred when concluding that the undefined term "domiciled," as used in 36 M.R.S.A. § 5102(5)(A) and which was relied upon as the exclusive basis for the State of Maine's prosecution of the Petitioners for criminal income tax violations, met the due process requirements of the Fourteenth Amendment to the United States Constitution by defining the offense with sufficient definiteness such that ordinary people could have understood what conduct was prohibited and in such a manner that did not encourage arbitrary and discriminatory enforcement.

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## PETITION FOR A WRIT OF CERTIORARI

Michael Falcone and James Jannetti petition for a writ of certiorari to the Maine Supreme Judicial Court in *State v. Falcone*, No. CUM 05-394, and *State v. Jannetti*, No. YOR 05-431, which were consolidated in Decision No. 2006 ME 90.

## OPINIONS BELOW

The opinion and order of the Maine Supreme Judicial Court is reported at 2006 ME 90 and 902 A.2d 141 (Me. 2006), and is reprinted at App. 1. The Maine Superior Court's opinion and judgment (Nos. 04-377 & 04-719, Cumberland County, *Cole, J.*, July 25, 2005) is unpublished and is reproduced at App. 22.

## STATEMENT OF JURISDICTION

The Maine Supreme Judicial Court issued its opinion and order on July 27, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a) because the validity of a Maine statute is being questioned on the ground that it is repugnant to the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Relevant statutory provisions of the Maine Revised Statutes Annotated are reproduced at App. 35.

## STATEMENT OF THE CASE

The Petitioners, graduates of the Maine Maritime Academy, were named in two separate indictments returned by Maine grand juries charging them with six counts of Maine income tax evasion and failure to file Maine income tax returns in violation of 36 M.R.S.A. § 184-A and 36 M.R.S.A. § 5332, respectively. App. 2. The prosecutions were premised on a theory that the Petitioners were domiciled in the State of Maine and thereby required by state law to file returns and pay state income tax. App. 22, 24. Petitioner Falcone is a serving civilian ship's officer aboard a United States Navy vessel and Petitioner Jannetti captains an American flag merchant ship.

At all times relevant to the criminal prosecutions of the Petitioners, every "resident individual" of Maine was subject to an income tax. 36 M.R.S.A. § 5111. *Also see* App. 8 (*dissent*). During the relevant time period, the Maine Tax Code defined a "[r]esident individual" as an individual who was "domiciled" in Maine or as an individual who was not "domiciled" in Maine, "but maintain[ed] a permanent place of abode in [Maine] and spen[t] in the aggregate more than 183 days of the taxable year in [Maine], unless he is in the Armed Forces of the United States." App. 3-4, *citing* 36 M.R.S.A. § 5102(5). However, the Maine Tax

Code did not provide a definition of "domiciled."[1] App. 8, 24.

Following their indictment, the Petitioners filed motions to dismiss the indictments pursuant to M. R. Crim. P. 12(b)(1) on grounds that (a) the provision of the Maine Tax Code upon which their prosecutions were premised, 36 M.R.S.A. §5102(5)(A), was impermissibly vague and thus violative of the due process protections afforded them under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §6-A of the Maine Constitution because the statute failed to define the term "domiciled," and (b) the vagueness of the domicile statute allowed Maine Revenue Services to pursue an arbitrary and discriminatory tax enforcement program focused on Maine Maritime Academy graduates, thereby violating the Petitioners' equal protection guarantees under the United States and Maine constitutions. App. 24-25. The Superior Court granted the Petitioners' request that their cases be consolidated when disposing of the motions. App. 2.

On July 25, 2005, the Maine Superior Court issued an order granting the Petitioners' motions to dismiss the indictments. In rendering its decision, the Superior Court concluded that "taxpayers in 1997-2002 . . . were asked to make a legal determination that courts of law found elusive, intensely circumstantial, and fact-specific." App. 30. The Maine Superior Court held that:

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[1] The Maine Legislature has since amended Section 5102(5), effective for tax years beginning on January 1, 2007, but still has not defined the term "domiciled," although it has identified some circumstantial exceptions to when the concept will be applied. App. 4 n. 2.

> Because the term 'domiciled' in 36 M.R.S.A. § 5102(5)(A) was not adequately defined in the Maine tax code or case law for tax enforcement purposes in the years 1997-2002, the criminal tax enforcement statutes 36 M.R.S.A. §§ 5332 and 184-A, to the extent they rely on 36 M.R.S.A. § 5102(5)(A) for the threshold requirement to file in those years, as well as for the known legal duty element of the violations, are therefore unconstitutionally vague. These provisions fail to define the conduct required in terms that a citizen of ordinary intelligence can understand.

App. 33.[2]

The Respondent appealed the Superior Court's order to the Maine Supreme Judicial Court. On July 27, 2006, a sharply divided court issued an opinion and order vacating the Superior Court's order of dismissal and remanding the case to the Superior Court for proceedings consistent with the opinion. App. 6. In a 4-3 holding, the majority decided that, although the undefined term "domicile" may be "a somewhat elusive concept," when "read in the context of the tax code and two centuries of usage, the term 'domiciled' is not unconstitutionally vague." App. 5-6. Two dissenting opinions were also issued. App. 7, 14.

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[2] The Superior Court did not reach Petitioners' argument that the statute invited arbitrary or discriminatory enforcement against alumni of Maine Maritime Academy or their Equal Protection claim. App. 33-34.

## REASONS FOR GRANTING THE WRIT

### A. This Court Should Rule that the Undefined Term "Domiciled" is Unconstitutionally Vague and that a Criminal Prosecution Based Upon that Term Violates the Fourteenth Amendment to the United States Constitution

The Fourteenth Amendment guarantees that no person will be subjected to criminal penalties "without due process of law." U.S. Const. amend. XIV. While the constitutional principle at issue here is not complex one, its violation is especially dangerous in a democratic society because of the potential for abuse of power by over-zealous government officials. "Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (invalidating a criminal statute on vagueness grounds as a violation of the Fourteenth Amendment's due process provisions). When voiding a statute that vaguely assigned criminal liability to anyone who publicly treats contemptuously the flag of the United States, this Court held that "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). As a federal constitutional principle, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness [so] that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v.*

*Lawson*, 461 U.S. 352, 357 (1983). When explaining its importance, this Court has held that:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute . . . Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

*Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972) (internal quotation marks and citations omitted). Thus, due process "incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (footnotes omitted).

It has been well established by this Court that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,

violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Against this backdrop, it is significant that, prior to its consideration of the Petitioners' case, the Maine Supreme Judicial Court had described the concept of domicile as a "somewhat elusive concept which is often confused with the related yet separate concept of 'residence'" and as a "mixed question of fact and law." App. 9, *citing Margani v. Sanders*, 453 A.2d 501, 503, 504 (Me. 1982). Furthermore, less than two years before deciding the Petitioners' appeal the Maine Supreme Judicial Court concluded that "[a]ll of the relevant terms [of 36 M.R.S.A. §§ 5102, 5220, 5330 (2005)] are adequately defined within the tax code, *except for the term domicile*." App. 8, citing *State v. Greenleaf*, 2004 ME 149, ¶ 34, 863 A.2d 877, 885 (emphasis added); *also see* App. 8-9. Thus, Maine's highest court had already determined before its consideration of this case that the meaning of domicile was elusive, confusing, inadequately defined, and required a fact-dependent application of law. Surely, a term that has been persistently puzzling to judges and lawyers would not be, by itself, sufficient so that an "ordinary person" could understand when he could be subjected to criminal prosecution.

Three of the four justices of the Maine Supreme Judicial Court who heard this case in Maine agreed with the Petitioners' vagueness analysis. *See, e.g.*, App. at 7. Highlighting the constitutional significance of the Maine Tax Code's lack of definiteness, the three dissenting justices of the Maine Supreme Judicial Court concluded that:

> [When] attempt[ing] to figure out what it means to be domiciled in Maine, a person of ordinary intelligence who did not work or live in Maine year-round would be forced, after finding no provision defining domicile in the Maine Revised

> Statutes, to consult the volumes of the Atlantic Reporter and, possibly, the old Maine Reporter, to try to locate cases discussing domicile. But that person of ordinary intelligence would face a large obstacle in that there are no tax or criminal cases that answer the question or are otherwise useful in helping him or her avoid criminal prosecution. Then, that person of ordinary intelligence would be forced to visit a tax attorney or other professional to help him or her with this legal determination – because after all, domicile is, in part, a legal determination. Nowhere in this process, however, does that person of ordinary intelligence become informed about what conduct the State prohibits. Given the current state of our law, any such answers are merely speculation and the penalty for guessing wrong is imprisonment.

(App. 10-11) (footnotes and internal citations omitted). Underscoring the uncertainty that has become associated with Maine's "domicile" statute is the fact that of the eight judges of the Maine judiciary who have interpreted it (three appellate justices and one trial court justice), four have found that statute to be unconstitutionally vague. Under circumstances where even jurists are in stark disagreement as to the clarity of the statute, to permit its use as a basis for a criminal prosecutions carrying felony penalties is patently repugnant to the due process protections guaranteed by the Constitution.

In his separate dissenting opinion, Justice Dana aptly described the sort of deliberation in which a dutiful taxpayer would have to engage when determining whether he is a "resident individual" for Maine income tax purposes and the dubious reliability of such contemplation:

> In order to discern whether a person is required to file an income tax return in Maine (and thus

whether the person is subject to criminal prosecution for failing to do so), an "ordinary person" would need to do the following, in approximately this order: (1) find 36 M.R.S. § 5220 (2005) in the Maine Tax Code, which sets forth who must file a tax return; (2) read and understand that "resident individuals" are required to file Maine income tax returns; (3) divine that there is a definition for "resident individuals," even though section 5220 does not direct the taxpayer to any such definition; (4) find the definition of "resident individuals," located in a different chapter of the Code at 36 M.R.S. § 5102(5) (2005); (5) learn that "resident individual" means "an individual . . . [w]ho is domiciled in Maine." 36 M.R.S. § 5102(5); (6) search the Code, in vain, for a definition for "domicile;" (7) discover that "domicile" is not defined in the Code; (8) search the Maine Revenue Services' rules for a definition; (9) discover that the rules also do not define "domicile"; (10) recognize the need to search the common law for a definition of "domicile"; (11) search the common law and find *Margani*, 453 A.2d at 503 to learn that domicile has two components: "residence" and the "intent to remain"; (12) recognize intuitively that domicile in the Maine Tax Code has the same meaning as in the Maine long-arm statute, *see id.*; 14 M.R.S. § 704-A(2)(G) (2005); (13) search the cases to better understand the meaning of "intent to remain," starting with the scores of disputes between Maine towns over pauper settlements in the 1800s; (14) read these cases and develop a list of factors that this Court has used to assess a person's "intent to remain"; and (15) apply the factors to one's own situation and guess at what the State will conclude. If the

> "ordinary person" guesses wrong, the State of Maine may seek to deprive her of her liberty.

App. 15-16.

Of course, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order." *Goguen*, 415 U.S. at 581. Just as this Court decided in *Goguen*, that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags," there was no reason why the Maine legislature could not have provided a reasonable measure of guidance for when an individual is susceptible to Maine income tax. *Goguen*, 415 U.S. 581-582. Proposing clarity in the domicile theory of taxation, the dissenting Maine justices noted that "Maine is one of only a minority of states that does not provide guidance for taxpayers regarding domicile either statutorily or though duly promulgated regulations." App. 11.

In his dissenting opinion, Justice Dana pointed out that "[a]t least twenty-five other states do not require . . . extensive legal research and analysis to understand what domicile means or how it will be determined for income tax purposes," and eight states do not have a state income tax,[3] leading him to conclude that "at least thirty-three states do better by their citizens in this regard than we do

[3] Alaska, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington and Wyoming.

in Maine." App. 17, including n. 10. Minnesota, for example, "provides its taxpayers with a list of twenty-six factors that courts must consider when determining whether someone intended to make the state his or her domicile," an approach that has understandably withstood a constitutional challenge on vagueness grounds. App. 11-13, *citing State v. Enyeart*, 676 N.W. 2d 311, 319-20 (Minn. Ct. App. 2004). Maine Supreme Judicial Court Justice Warren Silver, in a dissenting opinion in which Chief Justice Leigh Saufley and Justice Dana joined, noted that "[i]n addition to a clear lack of judicial guidance or statutory authority, the Maine Revenue Services, during the period of 1997-2002, had in place no rules or instructions which an individual could use to aid him or her in making a decision about whether he or she was a domiciliary of Maine and, accordingly, whether that individual was required to file a Maine income tax return for income not otherwise apportioned to this State." App. 14.

The capstone to the Petitioners' constitutional challenge to Section 5102(5)(A) is that Maine tax officials have purposefully attempted to confound the meaning of "domiciled" in order to increase the amount of income tax collections, raising the specter of an abuse of power by the State. Justice Dana noted in his dissenting opinion that "[n]ot only does Maine provide no guidance, but the Maine Revenue Services, presumably to keep the populace guessing, recently resisted a legislative attempt to provide a definition of and criteria for assessing a change of domicile." App. 18. Justice Dana highlighted that "[d]uring hearings before the [Maine Legislative] Taxation Committee in 2005, the Maine Revenue Services sent a memo to the committee resisting the efforts to provide guidance to people, stating: 'To provide a simple 'cookbook' method of

determining domicile would require Maine to compromise its ability to tax a number of taxpayers and thus suffer the resulting revenue loss.'" App. 18-19, *quoting An Act to Clarify the Definition of 'Domiciled' for Maine Income Tax Purposes: Hearing on L.D. 325 Before the Committee on Taxation*, 122nd Legis. (2005) (statement of Jerome D. Gerard, Acting Executive Director, Maine Revenue Services). Justice Dana also observed that "[e]ven though the committee heard testimony from the Maine Society of Certified Public Accountants as well as numerous individuals in support of L.D. 325, the Taxation Committee amended the bill, eliminating . . . language that directed the assessor to adopt rules to clarify and define domicile. . . . Instead, the Committee proposed an amended bill, which the House and Senate passed, which does not define domicile, but, rather, provides a handful of factors that the State *cannot* use to determine domicile." App. 19 n. 12 (citations omitted).

In short, the Maine Supreme Judicial Court's decision "leaves people of common intelligence to guess at the meaning of domicile and subject themselves to criminal sanctions if they guess wrong," which "does not pass constitutional muster." App. 14.

### B. The Question Presented is of Great Importance

Justice Howard Dana, one of the three dissenting justices, wrote a separate dissenting opinion advocating that the Maine Supreme Judicial Court should have affirmed the dismissal of the indictments "[b]ecause the State is using the threat of criminal prosecution based on this 'elusive concept' to keep people from 'so arranging [their] affairs as to keep taxes as low as possible . . . "

App. 21 (footnote omitted). Justice Dana wrote bluntly that "[u]nfortunately, Maine has chosen to 'hide the ball' in order to collect more taxes than that to which it would be otherwise entitled." App. 15. The Maine Supreme Judicial Court's endorsement of the State of Maine's reliance on an undefined term as a basis for criminal prosecutions is a clear violation of the Constitution's guarantee of due process of law.

### C. This Court's Review of the Federal Question Presented is the Petitioners' Last Resort

Unless this Court grants this petition, the constitutional infirmity created by Maine's use of the undefined and impermissibly vague term "domiciled" will escape review because the Maine Supreme Judicial Court's judgment regarding the question is final and no other relief is available. The fact that the Maine Supreme Judicial Court remanded the cases to the Maine Superior Court for trial is not dispositive of this petition. Indeed, this Court has held that jurisdiction is proper provided that the federal claim has been finally decided, regardless of whether further proceedings on the merits in the state courts will occur, because no subsequent review of the federal issue will ever occur notwithstanding the ultimate outcome of the case. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477-79 (1975). In these cases, if either Falcone or Jannetti ultimately prevails at a trial on the merits, the important constitutional question at issue would not be susceptible to review by this Court. On the other hand, if either Petitioner were to be convicted, no further review of the federal due process claim by the Maine Supreme Judicial Court would be available since Maine's highest court has already rendered a final decision

on this issue. In contrast, this Court's examination of the Maine Supreme Judicial Court's determination of the federal constitutional issue could preclude Maine's criminal tax prosecution of the Petitioners. Thus, the interests of justice will only be served if this Court considers the Petitioners' challenge to Section 5102(5)(A) and determines whether this undefined and impermissibly vague term can properly serve as the exclusive basis for their prosecution.

## CONCLUSION

WHEREFORE, this Court should grant the Petition for Certiorari in order to allow federal judicial review of the Petitioners' challenge of the State of Maine's reliance on an undefined technical term as a basis for a criminal tax prosecution on Fourteenth Amendment grounds.

Respectfully submitted,

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MAINE SUPREME JUDICIAL COURT
Decision: 2006 ME 90
Docket: Cum-05-394 & Yor-05-431
Argued: January 25, 2006
Decided: July 27, 2006

Panel: SAUFLEY, C.J., and CLIFFORD, DANA, ALEXANDER, CALKINS, LEVY, and SILVER, J.J.
Majority: CLIFFORD, ALEXANDER, CALKINS, and LEVY, J.J.
Dissent: SAUFLEY, C.J., and DANA, and SILVER, J.J.
Dissent: DANA, J.

STATE OF MAINE

v.

MICHAEL FALCONE

and

STATE OF MAINE

v.

JAMES JANNETTI

ALEXANDER, J.

[¶1] The State appeals from a judgment entered in the Superior Court (Cumberland County, *Cole, J.*) dismissing indictments against Michael Falcone and James Jannetti after determining that 36 M.R.S. § 5102(5)(A) (2005)[1] is unconstitutionally vague. Falcone and Jannetti

[1] Title 36 M.R.S. § 5102(5)(A) was significantly rewritten by P.L. 2005, ch. 519, pt. G, § G-2, effective March 29, 2006, but applicable only to "tax years beginning on or after January 1, 2007."

were indicted on charges of evasion of income tax and failure to make and file Maine income tax returns. The State argues that the court erred in finding that the statute was unconstitutionally vague. We agree and vacate the judgment.

## I. CASE HISTORY

[¶2] Falcone and Jannetti are merchant mariners who graduated from the Maine Maritime Academy. Both defendants were indicted on six counts of evasion of income tax (Class C), 36 M.R.S. § 184-A (2005), and six counts of failure to make and file Maine income tax returns (Class D), 36 M.R.S. § 5332 (2005), for the tax years 1997 to 2002.

[¶3] After indictment, the defendants filed a number of motions, including a motion to dismiss pursuant to M.R. Crim. P. 12(b)(1), arguing that section 5102(5)(A) is unconstitutionally vague. The cases were consolidated for hearing on these motions.

[¶4] At the hearing, counsel for the defendants stated that the sole issue for the trial court was "whether the prosecutions based on the undefined term 'domicile' violate the due process clause and equal protection provisions of the United States and Maine Constitutions." The briefing and oral argument largely focused on whether the term "domiciled" was adequately defined. The court granted the defendants' motion to dismiss, finding that the term "domiciled" in section 5102(5)(A) "was not adequately defined in the Maine tax code," and that the term was unconstitutionally vague. This appeal followed.

## II. DISCUSSION

[¶5] Review of a facial challenge to a Maine statute based on its constitutionality is de novo. *State v. Burby,* 2003 ME 95, ¶4, 828 A.2d 796, 798. "A statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity." *Kenny v. Dep't of Human Servs.,* 1999 ME 158, ¶7, 740 A.2d 560, 563. We "consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *State v. White,* 2001 ME 65, ¶4, 769 A.2d 827, 828-29.

[¶6] To find a statute unconstitutionally vague, we must find that the statute "fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. McLaughlin,* 2002 ME 55, ¶9, 794 A.2d 69, 72 (quotation marks omitted).

[¶7] Title 36 M.R.S. § 5102(5) (2005), in the definitions section of the income tax portion of the Maine Revised Statutes, states:

> **Resident individual.** "Resident individual" means an individual:
>
> **A.** Who is domiciled in Maine;
>
> **B.** Who is not domiciled in Maine, but maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this

State, unless he is in the Armed Forces of the United States.[2]

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[2] For tax years beginning on or after January 1, 2007, section 5102(5) has been amended by P.L. 2005, ch. 519, pt. G, § G-1 to read as follows:

5. **Resident individual** "Resident individual" means an individual:

A. Who is domiciled in Maine, unless:

(1) The individual does not maintain a permanent place of abode in this State, maintains a permanent place of abode elsewhere and spends in the aggregate not more than 30 days of the taxable year in this State; or

(2) Within any period of 548 consecutive days, the individual:

(a) Is present in a foreign country or countries for at least 450 days;

(b) Is not present in this State for more than 90 days;

(c) Does not maintain a permanent place of abode in this State at which a minor child of the individual or the individual's spouse is present for more than 90 days, unless the individual and the individual's spouse are legally separated; and

(d) During the nonresident portion of the taxable year with which, or within which, such period of 548 consecutive days begins and the nonresident portion of the taxable year with which, or within which, such period ends, is present in this State for a number of days that does not exceed an amount that bears the same ratio to 90 as the number of days contained in such portion of the taxable year bears to 548; or

B. Who is not domiciled in Maine, but maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in

(Continued on following page)

[¶8] The vagueness issue involves the term "domiciled" in subparagraph (A). The parties agree that subparagraph (B) does not apply to this case.

[¶9] Although it may be a "somewhat elusive concept," the concise and consistent rule is: "Domicile has two components: residence and the intent to remain." *Margani v. Sanders,* 453 A.2d 501, 503 (Me. 1982); *see also Poirier v. City of Saco,* 529 A.2d 329, 330 (Me. 1987) ("We have defined domicile as 'a place where a person lives or has his home, to which, when absent, he intends to return and from which he has no present purpose to depart.'") (quoting *Belanger v. Belanger,* 240 A.2d 743, 746 (Me. 1968)). The term "domicile" has long been in use by this Court to identify significant legal rights and responsibilities. *See, e.g., Gilmartin v. Emery,* 131 Me. 236, 239-42 (1932); *Gilman v. Gilman,* 52 Me. 165, 172-77 (1863) ("Residence, being a visible fact, is not usually in doubt. The intention to remain is not so easily proved. Both must concur in order to establish a domicile."); *Inhabitants of Exeter v. Inhabitants of Brighton,* 15 Me. 58, 60-61 (1838).

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this State, unless the individual is in the Armed Forces of the United States.

The geographic location of a political organization or political candidate that receives one or more contributions from the individual is not in and of itself determinative on the question of whether the individual is domiciled in Maine. The geographic location of a professional advisor retained by an individual may not be used to determine whether or not an individual is domiciled in Maine. For purposes of this subsection, "professional advisor" includes, but is not limited to, a person that renders medical, financial, legal, accounting, insurance, fiduciary or investment services. Charitable contributions may not be used to determine whether or not an individual is domiciled in Maine.

[¶10] Domicile is used in other areas of the law and in many titles in the Maine Revised Statutes, and has been consistently defined and applied. *See, e.g., Margani,* 453 A.2d at 503-04.[3] Where the meaning of a term can be adequately determined by examining the plain language definition or the common law definition, a challenge under the sufficient definiteness prong of a due process/vagueness claim will fail. *See State v. Flint H.,* 544 A.2d 739, 742 (Me. 1988). Although we might conceive of circumstances under which the common law definition's lack of specificity may render it unconstitutional as applied, that possibility does not justify the invalidation of the statute as unconstitutional on its face. *See Rust v. Sullivan,* 500 U.S. 173, 183 (1991) (stating that "[t]he fact that [the law] might operate unconstitutionally under some conceivable circumstances is insufficient to render [it] wholly invalid").

[¶11] Read in the context of the tax code and two centuries of usage, the term "domiciled" is not unconstitutionally vague.[4]

The entry is:

Judgment vacated. Remanded to the Superior Court for further proceedings consistent with this opinion.

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[3] Additionally, the concept of "domicile" usually entails a mixed question of fact and law. *Margani v. Sanders,* 453 A.2d 501, 504 (Me. 1982). In the present case, the facts regarding the defendants' alleged domicile have not been developed in the record.

[4] We decline the defendants' invitation to affirm the Superior Court's judgment on other grounds, as the record has not been sufficiently developed.

SILVER, J., with whom, SAUFLEY, C.J., and DANA, J., join, dissenting.

[¶12] I respectfully dissent from the majority's determination that the term "domicile," 36 M.R.S. § 5102(5)(A) (2005), is not unconstitutionally vague when it is read within the context of the tax code and when considering its nearly two centuries of use in our jurisprudence. Because I believe that the term "domicile" is inadequately defined, leaving people "of common intelligence [to] necessarily guess at its meaning," *State v. Reed,* 345 A.2d 891, 894 (Me. 1975) (quotation marks omitted), I would find that basing criminal sanctions on section 5102(5)(A) violates the defendants' right to due process of law in violation of the Fourteenth Amendment of the United States Constitution and article I, section 6-A of the Maine Constitution.

[¶13] It is an essential element of due process that crimes be defined with definiteness. *Knowlton v. State,* 257 A.3d 409, 409 (Me. 1969). The bedrock principle underlying this truism "is that all are entitled to be informed as to what the state commands or forbids and no one should be required, at peril of life, liberty, or property, to speculate as to the meaning of penal statutes." *Id.* at 410 (quotation marks omitted). Accordingly, we have struck down on vagueness grounds a defendant's condition of probation that required him to "cooperate fully to the satisfaction of the probation officer" because the defendant, without knowledge of "the specific nature of the requisite cooperation," could not know which behaviors would lead to the violation of the provision and thus to a "loss of his conditional liberty." *State v. Cote,* 539 A.2d 628, 628-29 (Me. 1988); *see also State v. Aucoin,* 278 A.2d 395, 396 (Me. 1971) (declaring a city ordinance prohibiting "loitering" to

be unconstitutionally vague because use of the undefined prohibition "as a criterion of criminal conduct, provides an 'incomprehensible standard' . . . to delimit a class of human behavior which shall be the subject of punishment"); *Reed,* 345 A.2d at 893-94.

[¶14] Here, the parameters of the defendants' required conduct are equally ill-defined. "Resident individuals" of Maine are required to file Maine income tax returns. 36 M.R.S. § 5220(1) (2005). A "resident individual" is defined as either an individual "[w]ho is domiciled in Maine," 36 M.R.S. § 5102(5)(A), or an individual "[w]ho is not domiciled in Maine, but maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State," *id.* § 5102(5)(B) (2005). As the Court has pointed out, what it means to be "domiciled" in Maine is not defined in the tax code. *See State v. Greenleaf,* 2004 ME 149, ¶34, 863 A.2d 877, 885 ("All of the relevant terms [of 36 M.R.S. §§ 5102, 5220, 5330 (2005)] are adequately defined within the tax code, except for the term domicile."); Op. Me. Att'y Gen. 30-38 (Feb. 15, 1980) (recognizing that "Title 36 contains no definition of either domiciliary or domicile").

[¶15] Unlike the majority, I believe that domicile has not been sufficiently defined by our jurisprudence to insulate it from constitutional infirmity. *See State v. Flint H.,* 544 A.2d 739, 742 (Me. 1988) (holding that the numerous cases interpreting "aiding and abetting" helped to save it from unconstitutional vagueness). We *ostensibly* defined domicile in a 1982 paternity case. *See Margani v. Sanders,* 453 A.2d 501, 503 (Me. 1982). At issue in *Margani* was the District Court's jurisdiction over the defendant, which required an examination of whether he was a "domiciliary of the State of Maine," triggering the court's personal

jurisdiction over him. *Id.* Before setting forth the definition of domicile, we began an examination of the term by noting that domicile is a "*somewhat elusive concept* which is often confused with the related yet separate concept of 'residence.'" *Id.* (emphasis added). We then proceeded to "define" domicile, as the majority does today, as the confluence of two elements: "residence and intent to remain."[5] *Id.* Moreover, we noted that the "elusive concept" of domicile is "a mixed question of fact and law." *Id.* at 503, 504.

[¶16] Prior to *Margani,* we had discussed domicile, but again in the context of a court's civil jurisdiction over a defendant. *Belanger v. Belanger,* 240 A.2d 743, 746 (Me. 1968). In *Belanger,* we noted:

> The fact that domicil is so dependent upon intent, cases dependent upon domicil present peculiar difficulties. As in other cases in which intent is relevant, it is supported by statement of the person whose intent is in issue and proof of other facts from which intent may properly be inferred. The factual circumstances may speak louder than the words.

*Id.*; *see also Gilman v. Gilman,* 52 Me. 165, 174-77 (1863) (discussing the difficulties of defining domicile); *Plant v.*

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[5] In *Margani v. Sanders,* we examined the factual findings supporting the trial court's determination that the defendant was a Maine domiciliary. 453 A.2d 501, 504 (Me. 1982). We did not then have occasion, however, to note the weight to be given to the factors supporting the court's finding, i.e., whether one factor was more important than another or what combination of factors would actually support a finding of domicile. Moreover, we did not have occasion to examine whether the facts presented there would support a finding of domicile in a criminal case where the burden of proof is upon the State to prove every element of an offense beyond a reasonable doubt.

*Harrison,* 74 N.Y.S. 411, 414 (N.Y. Sup. Ct. 1902) (stating that the facts of prior domicile cases are of "slight assistance" and definitions of domicile are "unsatisfactory"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS: DOMICIL OF PERSON HAVING TWO DWELLING PLACES § 20 special note on evidence for establishment of a domicil of choice (1971) ("It may be difficult to predict a court's decision as to the location of the domicil when the person's contacts are more or less equally divided between two or more states."); *cf.* Lea Brilmayer, *Interstate Preemption: the Right to Travel, the Right to Life, and the Right to Die,* 91 Mich. L. Rev. 873, 884 n. 45 (1993) ("The vagueness of the domicile test potentially submits the estate to multiple taxation.").

[¶17] Our previous cases discussing domicile add nothing to an understanding of this "elusive concept" other than merely repeating the general rule that the majority merely repeats today. Despite the unclear guidance from this very Court, as the Superior Court correctly noted, "taxpayers in 1997-2002 . . . were asked to make a legal determination that courts of law found elusive, intensely circumstantial, and fact-specific." The limited guidance provided by this Court as to what it means to be domiciled in Maine is not sufficiently definite to inform a person of ordinary intelligence what it means to be domiciled in this State, i.e., exactly what factors are important in making this determination and the relative weight to be given those factors.

[¶18] In an attempt to figure out what it means to be domiciled in Maine, a person of ordinary intelligence who did not work or live in Maine year-round would be forced, after finding no provision defining domicile in the Maine Revised Statutes, to consult the volumes of the Atlantic Reporter and, possibly, the old Maine Reporter, to try to

locate cases discussing domicile. But that person of ordinary intelligence would face a large obstacle in that there are no tax or criminal cases that answer the question or are otherwise useful in helping him or her avoid criminal prosecution.[6] Then, that person of ordinary intelligence would be forced to visit a tax attorney or other professional to help him or her with this legal determination[7] – because after all, domicile is, in part, a legal determination. *See Margani,* 453 A.2d at 504. Nowhere in this process, however, does that person of ordinary intelligence become informed about what conduct the State prohibits. Given the current state of our law, any such answers are merely speculation and the penalty for guessing wrong is imprisonment.

[¶19] Maine is one of only a minority of states that does not provide guidance for taxpayers regarding domicile either statutorily or through duly promulgated regulations. Some states take the opposite approach and provide taxpayers with a list of factors used to determine domicile. It was in this context that the constitutionality of the Minnesota taxpayer domicile rule was upheld in the face of arguments that it was unconstitutionally vague. *State v. Enyeart,* 676 N.W.2d 311, 319 (Minn. Ct. App. 2004). Minnesota provides its taxpayers with a list of twenty-six factors that courts must consider when determining whether someone intended to make the state his or her

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[6] As noted above, the few civil jurisdiction cases discussing the concept add little to an understanding of it.

[7] This in particular is a burden we have never placed on a criminal defendant. Furthermore, in the absence of further guidance from the Legislature or this Court, such professional advice is merely a guess as to what factors the Maine Revenue Services or, more importantly, a court, would consider decisive in making a determination of domicile.

domicile.[8] *Id.* at 319-20. The Minnesota Court of Appeals

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[8] Those factors include:

A. location of domicile for prior years;

B. where the person votes or is registered to vote, but casting an illegal vote does not establish domicile for income tax purposes;

C. status as a student;

D. classification of employment as temporary or permanent;

E. location of employment;

F. location of newly acquired living quarters whether owned or rented;

G. present status of the former living quarters, i.e., whether it was sold, offered for sale, rented, or available for rent to another;

H. whether homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and whether the homestead status of the former living quarters has not been renewed;

I. ownership of other real property;

J. jurisdiction in which a valid driver's license was issued;

K. jurisdiction from which any professional licenses were issued;

L. location of the person's union membership;

M. jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles;

N. whether resident or nonresident fishing or hunting licenses purchased;

O. whether an income tax return has been filed as a resident or nonresident;

P. whether the person has fulfilled the tax obligations required of a resident;

Q. location of any bank accounts, especially the location of the most active checking account;

R. location of other transactions with financial institutions;

(Continued on following page)

noted that "[a]lthough the domicile rule does not provide a magic formula for determining when a taxpayer has established an intention to change domicile – *relying instead on an exhaustive list of determinative factors – it specifies a standard of conduct that ordinary people of reasonable intelligence can understand.*" *Id.* at 321 (emphasis added).

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S. location of the place of worship at which the person is a member;

T. location of business relationships and the place where business is transacted;

U. location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member;

V. address where mail is received;

W. percentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than Minnesota;

X. location of jurisdiction from which unemployment compensation benefits are received;

Y. location of schools at which the person or the person's spouse or children attend, and whether resident or nonresident tuition was charged; and

Z. statements made to an insurance company, concerning the person's residence, and on which the insurance is based.

. . . .

MINN. R. 8001.0300(3) (2006). *See also* CONN. AGENCIES REGS. § 12-701(a)(1)-1 (2006) (listing twenty-eight non-inclusive factors for an individual to use to determine Connecticut domiciliary status); IOWA ADMIN. CODE r. 701-38.17(422) (2006) (creating rebuttable presumption of domiciliary status if one of five elements is met and providing additional list of ten relevant facts); N.C. ADMIN. CODE tit. 17, r. 6B.3901 (2006) (listing sixteen relevant factors for determining domicile); OHIO ADMIN. CODE § 5703-7-16 (2006) (listing factors not to be and to be considered in making a domicile determination).

[¶20] In addition to a clear lack of judicial guidance or statutory authority, the Maine Revenue Services, during the period of 1997-2002, had in place no rules or instructions which an individual could use to aid him or her in making a decision about whether he or she was a domiciliary of Maine and, accordingly, whether that individual was required to file a Maine income tax return for income not otherwise apportioned to this State. Because there was no guidance for Maine taxpayers at the time of the conduct at issue in these cases, I believe that section 5102(5)(A) is unconstitutionally void for vagueness. The majority's mere restatement of a vague legal test, without more, is not the type of "reasonable construction" sufficient to save the statute. *See State v. Witham,* 2005 ME 79, ¶7, 876 A.2d 40, 42 (stating that "legislation should not be held invalid on the ground of uncertainty if susceptible of any reasonable construction that will support it") (quotation marks omitted); *State v. Eaton,* 577 A.2d 1162, 1165 (Me. 1990). Such a construction leaves people of common intelligence to guess at the meaning of domicile and subject themselves to criminal sanctions if they guess wrong. Thus, I believe that the statute does not pass constitutional muster and I would affirm the dismissal of the indictments.

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DANA, J., dissenting.

[¶21] Because this Court admits that domicile is a "somewhat elusive concept," *see Margani v. Sanders,* 453 A.2d 501, 503 (1982), yet by this decision authorizes the State to employ this murky concept to charge people with crimes, I respectfully dissent.

[¶22] Criminal statutes must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . ." *State v. McLaughlin,* 2002 ME 55, ¶9, 794 A.2d 69, 72 (quotation marks omitted); *see also Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972) ("[All persons] are entitled to be informed as to what the State commands or forbids.") (quoting *Lanzetta v. New Jersey,* 304 U.S. 451, 453 (1939)). Yet to understand whether a person is required to file a tax return in Maine requires an "ordinary person" to conduct extensive legal research and analysis only to arrive at an uncertain answer.

[¶23] Although taxpayers are generally required to know the law and cannot claim ignorance of the law as a defense, the State, for its part, has an obligation to make the law relatively understandable. Unfortunately, Maine has chosen to "hide the ball" in order to collect more taxes than that to which it would be otherwise entitled.

[¶24] In order to discern whether a person is required to file an income tax return in Maine (and thus whether the person is subject to criminal prosecution for failing to do so), an "ordinary person" would need to do the following, in approximately this order: (1) find 36 M.R.S. § 5220 (2005) in the Maine Tax Code, which sets forth who must file a tax return; (2) read and understand that "resident individuals" are required to file Maine income tax returns; (3) divine that there is a definition for "resident individuals," even though section 5220 does not direct the taxpayer to any such definition; (4) find the definition of "resident individuals," located in a different chapter of the Code at 36 M.R.S. § 5102(5) (2005); (5) learn that "resident individual" means "an individual . . . [w]ho is domiciled in Maine." 36 M.R.S. § 5102(5); (6) search the

Code, in vain, for a definition for "domicile;" (7) discover that "domicile" is not defined in the Code; (8) search the Maine Revenue Services' rules for a definition; (9) discover that the rules also do not define "domicile"; (10) recognize the need to search the common law for a definition of "domicile"; (11) search the common law and find *Margani,* 453 A.2d at 503 to learn that domicile has two components: "residence" and the "intent to remain";[9] (12) recognize intuitively that domicile in the Maine Tax Code has the same meaning as in the Maine long-arm statute, *see id.*; 14 M.R.S. § 704-A(2)(G) (2005); (13) search the cases to better understand the meaning of "intent to remain," starting with the scores of disputes between Maine towns over pauper settlements in the 1800s; (14) read these cases and develop a list of factors that this Court has used to assess a person's "intent to remain"; and (15) apply the factors to one's own situation and guess at what the State will conclude. If the "ordinary person" guesses wrong, the State of Maine may seek to deprive her of her liberty.

[¶25] As a byproduct of this last search, the "ordinary person" may become acquainted with the rules and presumptions regarding domicile the State will or may

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[9] Contrary to the majority's conclusion, we have not "consistently" defined the intent component of domicile as the "intent to remain." In addition to defining it as the "intent to remain," *Margani v. Sanders,* 453 A.2d 501, 503 (Me. 1982), we have also defined it as: (1) "intent to return," *Poirier v. City of Saco,* 529 A.2d 329, 330 (Me. 1987); *Belanger v. Belanger,* 240 A.2d 743, 746 (Me. 1968); (2) "without any present intention of removing therefrom," *Gilman v. Gilman,* 52 Me. 165, 173 (Me. 1863) (quotation marks and emphasis omitted); (3) intent "to make [residence] the real, true, fixed home," *Holyoke v. Holyoke,* 110 Me. 469, 488, 87 A. 40, 49 (1913); (4) "intent to remain for an unlimited time," *Stockton v. Staples,* 66 Me. 197, 198 (1877); and (5) "intention to reside," *Gilman,* 52 Me. at 177 (emphasis omitted).

apply in her prosecution. "[A] person can have more than one residence but only one domicile." *Margani,* 453 A.2d at 503. Absent proof of change, one's original domicile continues, even if the person is absent from her home. *Id.* "[A] person does not change [her] domicile by simply moving from place to place." *Id.* at 503-04 (quotation marks omitted). The burden of showing a change of domicile is on the person asserting the change. *Id.* at 503. (Query whether the Court would apply this burden in a criminal prosecution?) But, the person should be aware that if there is conflicting evidence as to her intent to change domicile, the State will presume that her original domicile is her legal domicile. *Id.* (Same query?)

[¶26] At least twenty-five other states do not require such extensive legal research and analysis to understand what domicile means or how it will be determined for income tax purposes.[10] Rather, these states provide definitions for domicile in their tax regulations, many of which also outline the criteria used by each state to determine domicile. *See* ALA. ADMIN. CODE r. 810-3-2-.01 (2006); 006 05 CODE ARK. RULES AND REGS. r. 008 (1.26-51-102(9), 2.26-51-102(9)) (2006); CAL. CODE REGS. tit. 18, § 17014(c), (d) (2006); CONN. AGENCIES REGS. § 12-701(a)(1)-1 (2006); CODE HAW. RULES tit. 18, r. 18-235 (2006); IDAHO ADMIN. CODE 35.01.01.030 (2005); IND. ADMIN. CODE tit. 45, r. 3.1-1-22 (2006); IOWA ADMIN. CODE r. 701-38.17 (2006); KAN. ADMIN. REGS. § 92-12-4a (2006); MICH. ADMIN. CODE r.

[10] Although the author has not checked the statutes of all the other states, the following states do not have a state income tax: Alaska, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington and Wyoming. Thus, at least thirty-three states do better by their citizens in this regard than do we in Maine.

206.5 (2006); MINN. R. 8001.0300 (2006); CODE MISS. RULES r. 48-030-001(Reg. 701) (2006); MONT. ADMIN. R. 42.2.304 (2005); NEB. ADMIN. CODE tit. 316, r. 22-001 (2006); N.M. ADMIN. CODE tit. 3, § 3.3.1.9 (2006); N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20 (2006); N.C. ADMIN. CODE tit. 17, r. 6B.3901 (2006); OHIO ADMIN. CODE § 5703-7-16 (2006); OKLA. ADMIN. CODE § 710:50-3-36 (2005); OR. ADMIN. R. 150-316.027(1) (2006); 61 PA. CODE § 101.3 (2006); UTAH ADMIN. CODE R865-9I-2 (2006); VT. CODE R. 10-060-039 (2006);[11] 23 VA. ADMIN. CODE § 10-110-30 (2006); W. VA. CODE ST. R. § 110-21-7 (2006).

[¶27] Not only does Maine provide no guidance, but the Maine Revenue Services, presumably to keep the populace guessing, recently resisted a legislative attempt to provide a definition of and criteria for assessing a change of domicile. In 2005, several members of the Legislature proposed "An Act to Clarify the Definition of 'Domiciled' for Maine Income Tax Purposes," L.D. 325, § 1 (122nd Legis. 2005), which directed the tax assessor to "adopt rules to clarify and define 'domiciled' . . . in such a way that taxpayers . . . can readily determine whether they are domiciled in Maine for income tax purposes." The Legislature referred the bill to the Taxation Committee. 1 Legis. Rec. S-99 (2005). During hearings before the Taxation Committee in 2005, the Maine Revenue Services sent a memo to the committee resisting the efforts to provide guidance to people, stating: "To provide a simple 'cookbook'

[11] In its Code of Regulations, Vermont provides extensive guidance to persons by outlining (1) the definition of domicile; (2) the relevant factors for determining domicile; (3) the intent and actions necessary to change domicile; (4) the burden of proof; and (5) specific scenarios, such as married individuals, minor children, students, and military personnel. VT. CODE. R. 10-060-039 (2006).

method of determining domicile would require Maine to compromise its ability to tax a number of taxpayers and thus suffer the resulting revenue loss." *An Act to Clarify the Definition of "Domiciled" for Maine Income Tax Purposes: Hearing on L.D. 325 Before the Committee on Taxation,* 122nd Legis. (2005) (statement of Jerome D. Gerard, Acting Executive Director, Maine Revenue Services).[12]

[¶28] Because the State refuses to provide guidance for ordinary persons to determine where they are domiciled, I have, as the Court apparently expects ordinary persons to do, examined the cases and compiled a list of factors that we have relied upon in the past to evaluate a person's "intent to remain." In addition to the always helpful reference to "all circumstances," *see Waterborough v. Newfield,* 8 Me. 203, 205 (1832), we have specifically identified: (1) the person's property interests in real estate

[12] Even though the committee heard testimony from the Maine Society of Certified Public Accountants as well as numerous individuals in support of L.D. 325, the Taxation Committee amended the bill, eliminating the language that directed the assessor to adopt rules to clarify and define domicile. Comm. Amend. A to L.D. 325, No. H-588 (122nd Legis. 2005). Instead, the Committee proposed an amended bill, which the House and Senate passed, which does not define domicile, but, rather, provides a handful of factors that the State *cannot* use to determine domicile. *Id.* (providing that charitable and political contributions made by an individual and the geographic location of an individual's professional advisors may not be taken into consideration in determining domicile). The House and Senate passed the amended bill, Comm. Amend. A to L.D. 325, No. H-588 (122nd Legis. 2005), but then tabled the bill to the Appropriations Committee, which passed essentially the same bill as part of the Governor's 2006-2007 Supplemental Budget, L.D. 1968 (122nd Legis. 2006). *See* 1 Legis. Rec. H-899 (2005); 1 Legis. Rec. H-1090-91 (2005); 1 Legis. Rec. S-1171 (2005); 1 Legis. Rec. S-1216 (2005); 1 Legis. Rec. S-1331 (2005). See footnote 2 of the Court's opinion for the text of the enacted legislation.

in Maine and other states, *see Levasseur v. Aaron,* 503 A.2d 1291, 1293 (Me. 1986); (2) the amount of time the person spends in Maine versus other locations, *see id.,* 503 A.2d at 1293; *Poirier v. City of Saco,* 529 A.2d 329, 330 (Me. 1987); (3) where the person is registered to vote, *see Levasseur,* 503 A.2d at 1293; *Poirier,* 529 A.2d at 330; *Belmont v. Vinalhaven,* 82 Me. 524, 527-28, 531 20 A. 89, 89-90 (1890); *Gilman v. Gilman,* 52 Me. 165, 176 (1863); (4) where the person registers her motor vehicles, *see Margani,* 453 A.2d at 504; *Belanger,* 240 A.2d at 745; (5) where the person is a licensed driver, *see Margani,* 453 A.2d at 504; (6) where, geographically, the person works, *see Belmont,* 82 Me. at 528-29, 20 A. at 90; *Gilman,* 52 Me. at 175-76; (7) the person's mailing address, *see Margani,* 453 A.2d at 504; (8) where the person's spouse lives, *see Greene v. Windham,* 13 Me. 225, 228 (1836) (providing that the residence of the wife is rebuttable evidence of the domicile of the husband) (Query whether the reverse is the case?); (9) the existence of any documents in which the person has acknowledged that she is a resident of a particular state, *see Margani,* 453 A.2d at 504; *Gilman,* 52 Me. at 176, (10) the person's declarations about his or her intention, *see Levasseur,* 503 A.2d at 1293; *Holyoke v. Holyoke,* 110 Me. 469, 477-80, 87 A. 40, 45-46 (1913); *Gorham v. Canton,* 5 Me. 266, 267 (1828); (11) the state from which the person receives public aid, if any, *see Belanger,* 240 A.2d at 745, (12) the location of one's personal property, *see Holyoke,* 110 Me. at 489, 87 A. at 50, (13) the location of one's chauffeur, *see id.* at 490; (14) the person's "early attachments to a place of residence," *see Wayne v. Greene,* 21 Me. 357, 362 (1842); (15) the person's connections of blood or affinity, *see id.*; (16) "ties growing out of [a]cquaintances [the person] formed in youth," *see id.*; (17) the character of the person's home, *see id.*; (18) the

person's mode of life, *see id.*; and (19) the person's habits and disposition, *see id.*

[¶29] Because the State is using the threat of criminal prosecution based on this "elusive concept" to keep people from "so arranging [their] affairs as to keep taxes as low as possible,"[13] I would affirm the dismissal of the indictments.

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[13] "[T]here is nothing sinister in so arranging one's affairs as to keep taxes as low as possible . . . . [N]obody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions." *Comm'r of Internal Revenue v. Newman*, 159 F.2d 848, 850-51 (2d Cir. 1947) (Hand, J., dissenting).

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. S CR-04-377
CR-04-719

STATE OF MAINE,

v.

MICHAEL J. FALCONE,
JAMES N. JANNETTI,

Defendants

**ORDER**

This case comes before the Court on Defendant Michael J. Falcone's Motion to Dismiss pursuant to M. R. Crim. P. 12(b)(1). He is joined in this Motion by Defendant James N. Jannetti, who was indicted on identical charges, and is also a graduate of Maine Maritime Academy.

## FACTS

Defendant Michael J. Falcone (Falcone) graduated from Maine Maritime Academy in 1981 and works as a civilian mariner. On February 5, 2004, Falcone was charged with six counts of failing to file Maine income taxes, and six counts of intentionally evading payment of Maine income taxes, for the years 1997 through 2002, inclusive. Failure to file is a class D misdemeanor[1] and

[1] 36 M.R.S.A. § 5332. Failure to file return, supply information, pay tax

1. FAILURE TO PAY TAX, FILE RETURN, KEEP RECORDS OR SUPPLY INFORMATION. A person commits a Class D crime if that person:

A. Is required under this Part to pay any tax or estimated tax, and intentionally fails to pay that tax or estimated tax at the time or times required by law, or regulation;

(Continued on following page)

evading payment is a Class C felony.[2] The charges alleged

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B. Is required by this Part or rule prescribed under this Part to make a return, other than a return of estimated tax, and intentionally fails to make the return at the time or times required by law or rule; or

C. Is required to keep any records or supply any information and intentionally fails to keep the records or supply the information, at the time or times required by law or rule.

2. SUBSEQUENT OFFENSE. A person who violates subsection 1 when the person has a prior conviction for violation of this section or of section 184, 5330 or 5333 commits a Class C crime. *Title 17-A, section 9-A* governs the use of prior convictions when determining a sentence.

3. ADDITIONAL PENALTIES. This section is in addition to other penalties provided by law.

4. PRESUMPTION. Proof that a person filed a federal income tax return for a taxable year gives rise to a presumption that the person was required to file a federal income tax return for that taxable year.

36 M.R.S.A. § 5332 (2004)

[2] 36 M.R.S.A. § 184-A. Intentional evasion of tax

1. TAX AMOUNT OF $2,000 OR LESS. A person who intentionally attempts in any manner to evade or defeat any tax in an amount of $2,000 or less imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class D crime.

1-A. TAX AMOUNT OF $2000 OR LESS, SUBSEQUENT OFFENSE. A person who has a prior conviction for violation of this section or section 184 or 5332 who intentionally attempts in any manner to evade or defeat any tax in an amount of $2,000 or less imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class C crime. *Title 17-A, section 9-A* governs the use of prior convictions when determining a sentence.

2. TAX AMOUNT OVER $2,000. A person who intentionally attempts in any manner to evade or defeat any tax in an amount over $2,000 imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class C crime.

2-A. TAX AMOUNT OVER $2,000, SUBSEQUENT OFFENSE. A person who has a prior conviction for violation of this section or section 184 or 5332 who intentionally attempts in any manner to evade or

(Continued on following page)

Falcone falsely claimed to be a resident of New Hampshire knowing he was in fact a resident of Maine and required to file Maine income tax returns. On October 5, 2004, Falcone filed a Motion to Dismiss pursuant to Maine Rules of Criminal Procedure 12(b), arguing that the statute forming the basis for his indictment is unconstitutionally vague.

## ARGUMENT

Under Maine Criminal Rules, any defense in a criminal matter "which is capable of determination without the trial of general issue may be raised before trial by motion." M.R. Crim. P. 12(b)(1). Here, Falcone argues that the definition of a "resident individual" in 36 M.R.S.A. § 5102(5)(A) specifies which persons are required to file Maine income taxes, and forms the basis of Falcon's indictment. Under that statute, a "resident individual" is defined as a person "[w]ho is domiciled in Maine." 36 M.R.S.A. § 5102(5)(A).[3] Falcone argues the statute is unconstitutionally "void for vagueness" and unenforceable because it fails to define "domiciled" and thus, fails to specify the conduct required in terms that a citizen of ordinary intelligence could understand. Falcone also

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defeat any tax in an amount over $2,000 imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class B crime. *Title 17-A, section 9-A* governs the use of prior convictions when determining a sentence.

36 M.R.S. § 184-A (2004)

[3] The statutory definition of a "Resident individual" also includes a second group: individuals who are not domiciled in Maine but who maintain a permanent "place of abode" in Maine and spend more than 183 days in the State. 36 M.R.S.A. § 5102(5)(B)(2004). Members of the Armed Forces are not included. *Id.*

contends the vague definition impermissibly encourages arbitrary and selective enforcement procedures, in this case, against graduates of the Maritime Academy who are known to spend long periods of time away at sea and who may seek to legally avoid paying income taxes in Maine.

The State argues the term "domicile" need not be perfectly defined, and is reasonably understood for tax enforcement purposes through its plain meaning and case law interpretation.

## STANDARD OF REVIEW

The court will "presume a statute is constitutional and will invalidate it only when there is a 'clear showing by strong and convincing reasons' that it conflicts with the Constitution." *Ogunquit Sewer District v. Town of Ogunquit*, 1997 ME 33, ¶ 15, 691 A.2d 654, 658 (citation omitted). The party challenging the constitutionality of a statute bears "the burden of establishing its infirmity." *Kenny v. Dep't of Human Servs.*, 1999 ME 158, ¶ 7, 740 A.2d 560, 563. The court will construe a statute to preserve its constitutionality if possible, and is bound to avoid unconstitutional interpretations if a reasonable interpretation would satisfy constitutional requirements. *Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d 62, 66-67 (citations omitted). Thus the party challenging the statute must prove "no logical construction can be given to the words" that will render the statute constitutional. *Id.* at 67 (citing *Maine Milk Producers, Inc. v. Comm'r of Agric.*, 483 A.2d 1213, 1218 (Me. 1984)).

**a. Vagueness**

Criminal sanctions may deprive a defendant of a protected interest in his personal liberty. Therefore, the due process protections of United States Constitution and Article I, § 6-A of the Maine Constitution require that criminal defendants "be given 'fair notice of the standard of conduct to which they can be held accountable.'" *State v. Weeks*, 2000 ME 171, ¶ 7, 761 A.2d 44, 46 (citation omitted). A criminal statute "will be invalidated for vagueness when it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Id.* (citation omitted). Thus, a statute may be impermissibly vague when it forbids or requires conduct using terms so vague that people of common intelligence "must guess at its meaning." *Baldwin* at ¶ 10, 794 A.2d 62, 67 (citing *City of Portland v. Jacobsky*, 496 A.2d 646, 649 (Me. 1985)). The "underlying principal in a vagueness challenge to a criminal statute is 'that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *State v. Pettengill*, 635 A.2d 1309, 1310 (Me. 1994) (citation omitted). A statute may also be void for vagueness when it authorizes or "encourages arbitrary and discriminatory enforcement" of its provisions. *State v. Cloutier*, 2003 ME 7, ¶ 11, 814 A.2d 966, 970 (citation omitted).

Thus a criminal statute that forbid but did not define the meaning of "contact" with the victim was nonetheless held to be sufficiently definite under the plain, commonly understood meaning of that term. *Pettengill* at 1310 (finding "contact" is not a "word of art" but one of common usage and understanding). However, a requirement that a probationer "cooperate fully to the satisfaction of the

probation officer" was held to be too indefinite to give the defendant fair warning of the conduct it required. *State v. Cote*, 539 A.2d 628, 629 (Me. 1988).

However, the Law Court has also explained that "[o]bjective quantification, mathematical certainty, and absolute precision are not required" to satisfy due process protections of the United States Constitution or the Maine Constitution." *Baldwin v. Carter*, 2002 ME 52, ¶ 7 n.2, 794 A.2d 62, 66 (quoting *Maine Milk Producers, Inc. v. Comm'r of Agric.*, 483 A.2d 1213, 1221 (Me. 1984) and collecting cases). A statute is not impermissibly vague if "the meaning of the words used can be fairly ascertained by reference to the common law and to the judicial determinations in respect thereto." *State v. Flint H.*, 544 A.2d 739, 742, (Me. 1988) (citation omitted). Indeed, "judicial construction of a statute can implement a statutory concept as fully as an express legislative definition can." *Id.* Where the statute uses general language and is applied in relevant circumstances, the courts "are obliged to sustain [it] as constitutionally valid by giving it that rational construction which men of common intelligence would ascribe. . . ." *State v. Thibodeau*, 520 A.2d 708, 709 (Me. 1987). In a void for vagueness challenge, the "sufficiency of the language of [a] statute is properly tested in the circumstances of the case at bar." *State v. Witham*, 2005 ME 79, ¶ 11, ___ A.2d ___ (citing *State v. McLaughlin*, 2002 ME 55, ¶ 9, 794 A.2d 69, 73) (finding jury instructions on the standard for "depraved indifference" sufficient to overcome vagueness challenge).

**b. Domicile**

Here the Court addresses the specificity of the term "domiciled" as it pertains to the threshold requirement of whether Falcone was required to file taxes in Maine, the basis of the charges against him. An essential element of both crimes charged against Falcone is the intentional violation of a known legal duty to file.[4] In *State v. Greenleaf*, the Law Court noted that of several terms in the Maine tax code challenged for vagueness, all but the term "domicile" were "adequately defined within the tax code" itself. 2004 ME 149, ¶ 34, 863 A.2d 877, 885 (declining to reach a vagueness challenge where domicile was conceded by the defendant). The *Greenleaf* Court did not go on to determine whether the statutory term "domicile" was adequately defined elsewhere for purposes of criminal tax enforcement.

In 1982, the Law Court defined "domicile" for jurisdictional purposes in a civil family matter in *Margani v. Sanders*, 453 A.2d 501, 503-04 (Me. 1982). In *Margani*, the Court noted that domicile "has two components: residence and the intent to remain. When these concur there is domicile." *Id.* at 503. The Law Court noted that, by law, a person may have several places of residence, but only one

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[4] An essential element of both crimes is the "intentional attempt to evade or defeat any tax." *State v. Greenleaf*, 2004 ME 149, ¶ 14, 863 A.2d 877, 881 (defendant charged under same statutes as Falcone and their predecessors). The Law Court held that the intent elements of tax evasion or failure to file crimes requires the State to (1) demonstrate the defendant "consciously chose to violate a *known legal duty* to pay taxes and file returns;" and to (2) negate the defendant's claim "that because of a misunderstanding of the law, he had an objectively reasonable, good-faith belief that he was not violating a *known legal duty*." *Id.* ¶ 23, 863 A.2d at 882 (emphasis added).

domicile. *Id.* The Court identified certain important common law presumptions that attach to a person's domicile: first that one's domicile status persists even when a person is away for prolonged periods; second, that one's domicile status persists until a person affirmatively establishes its change. *Id.* (citing Restatement (Second) of Conflict of Laws at § 19). Finally, because one domicile "cannot be lost without gaining another," under the law, a person will never be without a domicile. *See Nadeau v. State Tax Assessor*, KEN-CV-84-62 (Maine Super. Ct. Ken Cty. October 24, 1984) (Brody, J.)

A determination of domicile is thus considered a mixed question of fact and law. *Margani*, at 504 (finding cumulative evidence of domicile sufficient to assert personal jurisdiction where defendant owned a house, held a driver's license, registered vehicles, and paid excise taxes in Maine, and said he lived in Maine "off and on" for ten years). In an earlier civil jurisdictional matter, the Law Court noted that because a domicile determination "is so dependent on intent, cases dependent upon domicile present particular difficulties. As in other cases in which intent is relevant, it is supported by statement[s] of the person whose intent is in issue and proof of other facts from which intent may be properly inferred. The factual circumstances may speak louder than the words." *Belanger v. Belanger*, 240 A.2d 743, 746 (Me. 1968).

For tax enforcement purposes pursuant to § 5102(5), a handful of Maine trial courts have relied on the *Margani* holding, along with the Restatement (Second) of Conflict of

Laws, cited with approval in *Margani*.[5] The Maine courts have noted that the concept of "domicile" for tax enforcement purposes is "fluid," because of its basis in intent[6] and "somewhat elusive" in general.[7]

Nonetheless, taxpayers in 1997-2002, the years for which Falcone is charged, were asked to make a legal determination that courts of law found elusive, intensely circumstantial, and fact-specific. Taxpayers like Falcone received no help from the tax statutes, and little guidance from the Maine Revenue Services (MRS) instructions accompanying State tax forms as to the factors they should consider in making the determination. In the MRS instructions, taxpayers were told to determine whether they were "domiciled" in Maine (and thus, their legal need to file) by referring to the following information: "Domicile is the place an individual establishes as his or her permanent home – the place to which he or she intends to return

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[5] Under the Restatement, one's domicile is "usually the place where he has his home," that is, "the center of his domestic, social and civic life." *Carroll v. State Tax Assessor*, CUM-CV-96-572 (Me. Super. Ct. Cum. Cty., June 27, 1997) (Calkins, J.) (citing Restatement (Second) of Conflict of Laws §§ 11, 12 and 18). The *Carroll* Court and the Restatement focused on intent: "[t]here must be a present intention to make a home. One must be able to say, 'This is now my home' and not 'This is to be my home.' It is essential that the person intends to remain in the home for a time at least." *Id. See also, See Nadeau v. State Tax Assessor,* KEN-CV-84-62 (Maine Super. Ct., Ken Cty. October 24, 1984) (Brody, J.) (finding taxpayer who was once domiciled in Maine had not met his burden of establishing a change in domicile). In *Nadeau,* the burden was put on the civil defendant to establish he was domiciled elsewhere, a burden he failed to meet. Defendant argued instead that he had abandoned his domicile and now had none. *Id.*

[6] *Herlihy v. State Tax Assessor*, KEN-AP-01-95 (Me. Super. Ct. Ken. Cty., April 14, 2003) (Studstrup, J.)

[7] *Margani* at 503.

after any period of absence." The instructions next allow that "[a] number of factors associated with residency are relevant in the evaluation of a claimant [later "claimed"] domicile;" however, none of those factors are ever shared with the taxpayer. Taxpayers are cautioned that "[a] domicile once established, continues until a new, fixed and permanent home is acquired. To change domicile a taxpayer must exhibit actions consistent with a change." What those actions might include, however, is also not explained. Finally the taxpayer is confounded with this information: "No change of domicile results from moving to a new location if the intent is to remain only for a limited time, even if it is for a relatively long duration." The instructions end with: "An individual can have only ***one*** domicile or permanent legal residence for income tax purposes," implying, incorrectly, that if one is properly domiciled in another state, one cannot also be required to pay Maine income taxes.[8]

Today, in contrast, Maine Revenue Services publishes a detailed, eight-paged booklet for taxpayers explaining the concept of "domicile" and the requirement to file. The booklet lists over 25 factors that may be weighed to determine if one's legal domicile is Maine. The booklet devotes several pages to distinguishing the status of "domiciled" from "statutory residency," "part year residency" and "nonresidency," as well as explaining the effect a person's alien, student, or military status may have on the domicile determination. Maine Revenue Services begins the booklet by conceding that many people, like Falcone, who own homes or spend time working or living

[8] *See* 36 M.R.S.A. § 5102(5)(B).

in other states or countries "have difficulty understanding how this will affect their tax responsibilities," and may fail to file.[9] However, in the years for which he is charged, Falcone did not have the benefit of the booklet to help him with the threshold question of whether he met the statutory definition of "domiciled" persons and was required to file in Maine at all.

Thus, in this case, the term "domiciled" in 36 M.R.S.A. § 5102(5) of the tax code was undefined, forcing Falcone to "guess at its meaning" when seeking to comply with Maine tax statutes and avoid criminal sanctions. *Baldwin*, ¶ 10, 794 A.2d at 67. While an understanding of "domiciled" was essential to Falcone's knowledge of his legal duty to file, his duty was not conveyed "with sufficient definiteness" in the statutes so that ordinary taxpayers could understand what conduct was required or prohibited. *Weeks*, ¶ 7, 761 A.2d at 46.

Nor could Falcone rely on the commonly understood meaning of "domiciled" as "dwelling" or "residing," to convey the complex requirements and presumptions imputed to the term for purposes of criminal tax enforcement. *State v. Reed*, 345 A.2d 891, 893 (Me. 1975). The term "domiciled" was also not part of the general language of the 36 M.R.S.A. § 5102, subject to interpretation by giving it "the rational construction which men of common intelligence would ascribe." *Thibodeau*, 520 A.2d at 709. Indeed, "domiciled" as it is used in that tax statute is a "word of art" requiring detailed knowledge unavailable in

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[9] The booklet also includes answers to frequently asked questions about working or living outside the State. *See* "Maine Revenue Services Guidance to Residency Status for Individual Income Tax Purposes." *http://www.state.me.us/revenue/incomeestate/Guidance.htm.* (Last visited 7/20/2005).

the statute for its construction. *Pettengill*, 635 A.2d at 1310. In fact, the MRS now uses eight single-spaced pages explaining it to taxpayers.

Nor had judicial construction of "domicile" for purposes of civil personal jurisdiction elucidated the concept sufficiently for criminal tax enforcement purposes. Although some of the "domicile" definition and presumptions of *Margani* were loosely reflected in the 1997-2002 instructions to taxpayers, those instructions were not sufficiently definite so that a person like Falcone, of ordinary intelligence, who did not reside or work in Maine all year, could understand which circumstances or factors might give rise to a legal duty to file.

Because the term "domiciled" in 36 M.R.S.A. § 5102(5)(A) was not adequately defined in the Maine tax code or case law for tax enforcement purposes in the years 1997-2002, the criminal tax enforcement statutes 36 M.R.S.A. §§ 5332 and 184-A, to the extent they rely on 36 M.R.S.A. § 5102(5)(A) for the threshold requirement to file in those years, as well as for the known legal duty element of the violations, are therefore unconstitutionally vague. These provisions fail to define the conduct required in terms that a citizen of ordinary intelligence can understand. This Court therefore GRANTS Defendant Michael J. Falcone and Defendant James N. Jannetti's Motions to Dismiss the charges against them pursuant to M.R. Crim. P. § 12.

This Court does not reach Falcone's argument that the statute invited arbitrary or discriminatory enforcement

against alumni of Maine Maritime Academy, nor his Equal Protection claim.

Dated July 25, 2005 /s/ Roland Cole
Justice, Superior Court

**36 M.R.S.A. § 184-A. Intentional evasion of tax**

**1. Tax amount of $2,000 or less.** A person who intentionally attempts in any manner to evade or defeat any tax in an amount of $2,000 or less imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class D crime.

**1-A. Tax amount of $2000 or less, subsequent offense.** A person who has a prior conviction for violation of this section or section 184 or 5332 who intentionally attempts in any manner to evade or defeat any tax in an amount of $2,000 or less imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class C crime. Title 17-A, section 9-A governs the use of prior convictions when determining a sentence.

**2. Tax amount over $2,000.** A person who intentionally attempts in any manner to evade or defeat any tax in an amount over $2,000 imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class C crime.

**2-A. Tax amount over $2,000, subsequent offense.** A person who has a prior conviction for violation of this section or section 184 or 5332 who intentionally attempts in any manner to evade or defeat any tax in an amount over $2,000 imposed by this Title or the payment of the assessed tax, in addition to any other penalties provided by law, commits a Class B crime. Title 17-A, section 9-A governs the use of prior convictions when determining a sentence.

**3. Deleted.** Laws 2003, c. 452, § U-2, eff. July 1, 2004.

**36 M.R.S.A. § 5102. Definitions**

The following definitions shall apply throughout this Part, except as the context may otherwise require:

1. Repealed. Laws 1979, c. 378, § 35.

**1-A. Lobster boat operator.** Any person licensed by the Department of Marine Resources to fish for, take or catch lobsters and who operates a boat for that purpose is a lobster boat operator.

**1-B. Affiliated group.** "Affiliated group" means a group of 2 or more corporations in which more than 50% of the voting stock of each member corporation is directly or indirectly owned by a common owner or owners, either corporate or noncorporate, or by one or more of the member corporations.

**1-C. Maine adjusted gross income.** "Maine adjusted gross income" has the following meanings.

**A.** "Maine adjusted gross income" means, for a resident individual, the federal adjusted gross income of that individual, as modified by section 5122.

**B.** "Maine adjusted gross income" means, for a nonresident individual, that part of his federal adjusted gross income derived from sources within this State, as determined under section 5142.

**1-D. Laws of the United States.** "Laws of the United States" means the Code, as defined in section 111, subsection 1-A, and other provisions of the laws of the United States relating to federal income taxes as of the date specified in section 111, subsection 1-A.

**2. Nonresident estate or trust.** "Nonresident estate or trust" shall mean an estate or trust which is not a resident estate or trust.

**3. Nonresident individual.** "Nonresident individual" shall mean an individual who is not a resident individual.

**4. Resident estate or trust.** "Resident estate or trust" shall mean:

**A.** The estate of a decedent who at his death was domiciled in this State;

**B.** A trust created by will of a decedent who at death was domiciled in this State; or

**C.** A trust created by, or consisting of property of, a person domiciled in this State.

**D. Repealed.** Laws 2003, c. 618, § B-19, eff. July 1, 2005.

**5.** Resident individual. "Resident individual" means an individual:

**A.** Who is domiciled in Maine, unless:

**(1)** The individual does not maintain a permanent place of abode in this State, maintains a permanent place of abode elsewhere and spends in the aggregate not more than 30 days of the taxable year in this State; or

**(2)** Within any period of 548 consecutive days, the individual:

**(a)** Is present in a foreign country or countries for at least 450 days;

**(b)** Is not present in this State for more than 90 days;

(c) Does not maintain a permanent place of abode in this State at which a minor child of the individual or the individual's spouse is present for more than 90 days, unless the individual and the individual's spouse are legally separated; and

(d) During the nonresident portion of the taxable year with which, or within which, such period of 548 consecutive days begins and the nonresident portion of the taxable year with which, or within which, such period ends, is present in this State for a number of days that does not exceed an amount that bears the same ratio to 90 as the number of days contained in such portion of the taxable year bears to 548; or

**B.** Who is not domiciled in Maine, but maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State, unless the individual is in the Armed Forces of the United States.

The geographic location of a political organization or political candidate that receives one or more contributions from the individual is not in and of itself determinative on the question of whether the individual is domiciled in Maine. The geographic location of a professional advisor retained by an individual may not be used to determine whether or not an individual is domiciled in Maine. For purposes of this subsection, "professional advisor" includes, but is not limited to, a person that renders medical, financial, legal, accounting, insurance, fiduciary or investment services. Charitable contributions may not be used to determine whether or not an individual is domiciled in Maine.

**6. Corporation.** "Corporation" means any business entity subject to income taxation as a corporation under the laws of the United States, except the following:

**A.** A corporation that is subject to tax under chapter 357[1] or that would be subject to tax under chapter 357 if the insurance business conducted by such corporation were conducted in this State;

**B.** A corporation subject to tax under section 5206; or

**C.** A business entity referred to in Title 24-A, section 1157, subsection 5, paragraph B, subparagraph (1).

For purposes of this subsection, a corporation described in paragraph A is an "insurance company," and a health maintenance organization to the extent operated under authority of a certificate issued by the Superintendent of Insurance pursuant to Title 24-A, section 4204 is a "Maine health maintenance organization." Notwithstanding paragraph A, an insurance company is subject to the tax imposed by this Part with respect to income it receives from a Maine health maintenance organization, except where the Maine health maintenance organization is separately organized and subject to income taxation. The provisions of this Part pertaining to the taxation and reporting obligations of a unitary business, including section 5200, section 5220, subsection 5 and section 5244, apply to the income, factors and affiliations of an insurance company arising from a Maine health maintenance organization as though the Maine health maintenance organization were a separate corporation, but do not otherwise apply to such insurance company.

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[1] 36 M.R.S.A. § 2511 et. seq.

**6-A. Repealed.** Laws 1997, c. 24, § C-8.

**7. Fiscal year.** "Fiscal year" means an accounting period of 12 months ending on the last day of any month except December, or an accounting period of more or less than 12 months, which period is employed as the fiscal year of the taxpayer for the United States income tax purposes.

**8. Maine net income.** "Maine net income" means, for any taxable year for any corporate taxpayer, the taxable income of that taxpayer for that taxable year under the laws of the United States as modified by section 5200-A and apportionable to this State under chapter 821.[2] To the extent that it derives from a unitary business carried on by 2 or more members of an affiliated group, the Maine net income of a corporation is determined by apportioning that part of the federal taxable income of the entire group that derives from the unitary business. If a taxable corporation is an S corporation, "Maine net income" means the amount taxable at the federal level pursuant to the Code, Sections 1374 and 1375.[3]

**8-A.** Repealed. Laws 1983, c. 571, § 15.

**8-B.** Repealed. Laws 1981, c. 704, § 9, eff. Dec. 1, 1982.

**9.** Repealed. Laws 1979, c. 378, § 35.

**10. Taxable corporation.** "Taxable corporation" means, for any taxable year, a corporation that, at any time during that taxable year, realized Maine net income. "Taxable corporation" includes any S corporation that is

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[2] 36 M.R.S.A. § 5210 et. seq.

[3] 26 U.S.C.A. §§ 1374, 1375.

required by section 5241 to file a return and that is subject to federal tax under the Code, Section 1374 and 1375.[2]

**10-A. Unitary business.** "Unitary business" means a business activity which is characterized by unity of ownership, functional integration, centralization of management and economies of scale.

**11. Other terms.** Any other terms used in this Part have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless different meanings are clearly required.

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**36 M.R.S.A. § 5111. Imposition and rate of tax**

A tax is imposed for each taxable year beginning on or after January 1, 2000, on the Maine taxable income of every resident individual of this State. The amount of the tax is determined as provided in this section.

**1. Repealed.**

**1-A. Single individuals and married persons filing separate returns; tax years beginning 2000, 2001.** For tax years beginning in 2000 or 2001, for single individuals and married persons filing separate returns:

| If Maine taxable income is: | The tax is: |
|---|---|
| Less than $4,150 | 2% of the Maine taxable income |
| At least $4,150 but less than $8,250 | $83 plus 4.5% of the excess over $4,150 |

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[2] 36 M.R.S.A. § 5210 et. seq.

| | |
|---|---|
| At least $8,250 but less than $16,500 | $268 plus 7% of the excess over $8,250 |
| $16,500 or more | $846 plus 8.5% of the excess over $16,500 |

**1-B. Single individuals and married persons filing separate returns; tax years beginning 2002.** For tax years beginning on or after January 1, 2002, for single individuals and married persons filing separate returns:

| If Maine taxable income is: | The tax is: |
|---|---|
| Less than $4,200 | 2% of the Maine taxable income |
| At least $4,200 but less than $8,350 | $84 plus 4.5% of the excess over $4,200 |
| At least $8,350 but less than $16,700 | $271 plus 7% of the excess over $8,350 |
| $16,700 or more | $856 plus 8.5% of the excess over $16,700 |

**2. Repealed.**

**2-A. Heads of households; tax years beginning 2000, 2001.** For tax years beginning in 2000 or 2001, for unmarried individuals or legally separated individuals who qualify as heads of households:

| If Maine taxable income is: | The tax is: |
|---|---|
| Less than $6,200 | 2% of the Maine taxable income |
| At least $6,20 but less than $12,400 | $124 plus 4.5% of the excess over $6,200 |
| At least $1,400 but less than $24,750 | $403 plus 7% of the excess over $12,400 |
| $24,750 or more | $1,268 plus 8.5% of the excess over $24,750 |

**2-B. Heads of households; tax years beginning 2002.** For tax years beginning on or after January 1, 2002, for unmarried individuals or legally separated individuals who qualify as heads of households:

| If Maine taxable income is: | The tax is: |
|---|---|
| Less than $6,300 | 2% of the Maine taxable income |
| At least $6,300 but less than $12,500 | $126 plus 4.5% of the excess over $6,300 |
| At least $12,500 but less than $25,050 | $405 plus 7% of the excess over $12,500 |
| $25,050 or more | $1,284 plus 8.5% of the excess over $25,050 |

**3. Repealed.**

**3-A. Individuals filing married joint return or surviving spouses; tax years beginning 2000, 2001.** For tax years beginning in 2000 or 2001, for individuals filing married joint returns or surviving spouses permitted to file a joint return:

| If Maine taxable income is: | The tax is: |
|---|---|
| Less than $8,250 | 2% of the Maine taxable income |
| At least $8,250 but less than $16,500 | $165 plus 4.5% of the excess over $8,250 |
| At least $16,500 but less than $33,000 | $536 plus 7% of the excess over $16,500 |
| $33,000 or more | $1,691 plus 8.5% of the excess over $33,000 |

**3-B. Individuals filing married joint return or surviving spouses; tax years beginning 2002.** For tax years beginning on or after January 1, 2002, for

individuals filing married joint returns or surviving spouses permitted to file a joint return:

| If Maine taxable income is: | The tax is: |
|---|---|
| Less than $8,400 | 2% of the Maine taxable income |
| At least $8,400 but less than $16,700 | $168 plus 4.5% of the excess over $8,400 |
| At least $16,700 but less than $33,400 | $542 plus 7% of the excess over $16,700 |
| $33,400 or more | $1,711 plus 8.5% of the excess over $33,400 |

**4. Additional tax.** Additionally, a tax is imposed for each taxable year beginning on or after January 1, 1989, on the Maine adjusted gross income of every nonresident individual. The amount of the tax equals the tax computed under this section and chapter 805,[1] as if the nonresident were a resident, multiplied by the ratio of the individual's Maine adjusted gross income, as defined in section 5102, subsection 1-C, paragraph B, to the nonresident's entire federal adjusted gross income, as modified by section 5122.

**5. Income tax surcharge.** In addition to the tax established by this section as indexed for the taxable year, there is imposed a tax surcharge on the amount of state tax liability due for any tax year that begins in 1991 or 1992. The Maine taxable income amount must be indexed in accordance with chapter 841.[2] The surcharge is as follows:

**A.** For single individuals and married persons filing separate returns:

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[1] 36 M.R.S.A. § 5121 et. seq.

[2] 36 M.R.S.A. § 5401 et. seq.

| If Maine taxable income is: | The surcharge tax is the following percentage of the tax otherwise imposed by this section: |
|---|---|
| $37,500 or less | 5% |
| In excess of $37,500 | 5% plus 10% of the tax on the taxable income over $37,500 |

**B.** For unmarried individuals or legally separated individuals who qualify as heads of households:

| If Maine taxable income is: | The surcharge tax is the following percentage of the tax otherwise imposed by this section: |
|---|---|
| $56,250 or less | 5% |
| In excess of $56,250 | 5% plus 10% of the tax on the taxable income over $56,250 |

**C.** For individuals filing married joint returns or surviving spouses permitted to file a joint return:

| If Maine taxable income is: | The surcharge tax is the following percentage of the tax otherwise imposed by this section: |
|---|---|
| $75,000 or less | 5% |
| In excess of $75,000 | 5% plus 10% of the tax on the taxable income over $75,000 |

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**36 M.R.S.A. § 5332. Failure to file return, supply information, pay tax**

**1. Failure to pay tax, file return, keep records or supply information.** A person commits a Class D crime if that person:

**A.** Is required under this Part to pay any tax or estimated tax, and intentionally fails to pay that tax or estimated tax at the time or times required by law or regulation;

**B.** Is required by this Part or rule prescribed under this Part to make a return, other than a return of estimated tax, and intentionally fails to make the return at the time or times required by law or rule; or

**C.** Is required to keep any records or supply any information and intentionally fails to keep the records or supply the information, at the time or times required by law or rule.

**2. Subsequent offense.** A person who violates subsection 1 when the person has a prior conviction for violation of this section or of section 184, 5330 or 5333 commits a Class C crime. Title 17-A, section 9-A governs the use of prior convictions when determining a sentence.

**3. Additional penalties.** This section is in addition to other penalties provided by law.

**4. Presumption.** Proof that a person filed a federal income tax return for a taxable year gives rise to a presumption that the person was required to file a federal income tax return for that taxable year.